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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955

No. 754

O. K. ARMSTRONG, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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O. K. Armstrong, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on January 18, 1956.

CITATIONS TO OPINIONS BELOW

There was no written opinion of the United States District Court for the Western District of Missouri (Southern Division), the trial court. There was a memorandum order on Defendant's motion for judgment of acquittal or in the alternative for a new trial. (R. 42). The

opinion of the Circuit Court of Appeals, printed in the Appendix A is reported in Fed. 2nd .

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 18, 1956 (App. B). Motion for judgment of acquittal or in the alternative, for a new trial was denied May 27, 1955 (R. 42).

The jurisdiction of this Court was invoked under 28 U.S.C.A. 1254 (1).

The time for the filing of this petition for a writ of certiorari was extended by order dated January 31, 1956, until March 17, 1956 (App. D).

The Circuit Court of Appeals has entered an order staying its mandate (App. A).

This petition is filed in accord with revised Rules 19, 21 and 23 of this Court.

STATUTE INVOLVED

The Statute involved is Section 145 (b) Title 26 U.S.C.A. (R. 1) and Rule 52 of the Federal Rules of Criminal Procedure (App. B).

QUESTIONS PRESENTED

1. Whether the court below in affirming the judgment of the trial court misinterpreted and misapplied decisions of this Court and fundamentally established principles of law. The trial court charged the jury that a sum of money (received by petitioner in 1949 and regarded by him as a gift and therefore not taxable) was as a matter of law taxable income. This charge denied the jury its right and duty to decide a question which this Court has held to be *a factual question that must be decided by a jury.*

2. Whether the charge to the jury that the petitioner had the burden of proving the allowability of deductions claimed to a reasonable degree of certainty in determining his net income, was such a plain and palpable error that the Court of Appeals should have noted and corrected on appeal under Rule 52 of the Federal Rules of Criminal Procedure.

3. Whether the court below misinterpreted and misapplied decisions of this Court and other courts, in holding that affidavits of jurors, indicating misconduct in reaching a verdict not entirely on the evidence and the law, were not admissible and could not be used under the facts and circumstances of this case; and in holding that the jurors' actions were "inherent in the verdict"; and whether the petitioner was thus deprived of his constitutional right to a fair and impartial trial by reason of the jury falsely announcing a verdict of guilty when in fact no true verdict had been reached.

STATEMENT

The petitioner was indicted by a grand jury on three counts. The indictment is set out in the record (R. 12). The three counts are similar except for the amounts and the years involved. In substance they charged the petitioner with knowingly and willfully attempting to evade his income taxes. The jury returned a verdict of guilty on all three counts with unanimous recommendation for leniency.

Status in Court Below

The record before the Court of Appeals presented only two issues:

1. Whether the charge to the jury by the trial court materially affected the substantial rights of the petitioner when the Court charged as a matter of law that a sum of money paid to the petitioner by the Reader's Digest was taxable instead of leaving it to the jury to decide.

2. Whether the trial court was in error in refusing to consider affidavits of jurors as to their actions in arriving at a verdict and in refusing to grant a new trial on the facts presented by the affidavits.

The question of the charge to the jury on the burden of proof being on the petitioner to sustain deductions claimed in his income tax return was not presented to the trial court or the Court of Appeals.

Facts

I.

Since 1939 the petitioner was a free lance writer for magazines, with a major portion of his literary output going to the Reader's Digest (R. 16). He testified in the trial court that in 1949 he received a check for $2,500 from the Reader's Digest, with congratulations from the editor on the occasion of the petitioner's forthcoming marriage. Petitioner considered this check as a gift, and therefore did not report it on his income tax return. He was not on the payroll of the Reader's Digest as an officer or employee. He had always been paid for each article which he wrote that was accepted, and had never received a salary for his writing (R. 16). The check in question was not given for any specific work done, or for anything owed him in the past, or for any future services (R. 10). The editor of the Reader's Digest testified that the check was given not as compensation but in contemplation of the petitioner's wedding (R. 9).

Because of the manner in which the Reader's Digest kept its records and because it took a deduction for that amount as expense in determining its own net income (R. 29), the trial court instructed the jury as a matter of law that said amount was taxable income (R. 29). The petitioner had no knowledge of how the Reader's Digest kept its records.

The petitioner reported the amount in question as income on an amended income tax return for 1949 after an audit of his returns had been made and at the suggestion of a revenue agent (R. 18).

The petitioner requested that the trial court instruct the jury in substance that if the jury believed that the petitioner received the $2,500 from the Reader's Digest without any services or other consideration having been rendered therefor in the past or anticipated in the future, then such check was to be considered as a gift, and if the jury so found, then the amount need not have been reported on the return (R. 18, 19). This charge was refused and due exception was taken thereto.

The trial court charged the jury: "I charge you that the $2,500 paid to the defendant in 1949 is and was a bonus and therefore, taxable income to Mr. Armstrong in the year 1949 and you may so consider it in determining his tax liability to the Government for the calendar year" (R. 29).

The Circuit Court of Appeals sustained the action of the trial court in all particulars, including this charge to the jury (App. B).

II.

The petitioner, as a free-lance writer, had certain expenses which were properly deductible in determining his net taxable income (R. 30, 31). He deducted from his gross income travel and other expenses connected with and arising from his business or profession. (R. 30, 31). Some of these claimed expenses were disallowed. The petitioner "contends that he had paid other business expenses in addition to those allowed as deductions by the Government" (R. 31).

On this question the trial court charged the jury in part as follows: "One claiming a deduction from a tax

must prove his right thereto by evidence, not leaving the matter in the realm of speculation and conjecture, and establish such facts with a reasonable degree of certainty." (R. 31). This part of the charge to the jury was not objected to nor was exception taken thereto. This question was not presented to the Circuit Court of Appeals and the court did not pass on it, as it should have done under Rule 52 of the Federal Rules of Criminal Procedure.

III.

The petitioner's case in the trial court was given to the jury in the late afternoon of the third day of the trial. On the same day the jury returned to the courtroom and the foreman asked the trial judge: "The question propounded by the jury is can the jury make recommendations on their verdict?" The trial court answered in substance that the jury could do so, and the court would give any recommendations such consideration as it saw fit. Whereupon the jury retired again, and returned with their verdict of guilty on the three counts, with this statement by the foreman: "Your Honor, the entire jury recommends leniency in this case" (R. 34, 36).

On April 20, 1955, one of the jurors, Clarence E. McCoy, came to the trial judge's chambers and personally presented the following affidavit: (Filed in U. S. District Court on April 20, 1955.) (R. 37, 38).

> Judge Albert Ridge
> Federal Court
> Springfield, Mo.
>
> I have been much troubled by the verdict cast against Mr. Armstrong last Wednesday in your court.
>
> Most of the jury did not want to come back; I did not feel Mr. Armstrong was guilty as charged and I argued we should come back next day and debate the issue. They finally suggested we compromise the verdict and ask for leniency, that included most of the jury. But I tell you honestly I made a mistake in

agreeing to the compromise. I never believed him guilty, and I want to correct the mistake. I hereby certify that the evidence never convinced me beyond a reasonable doubt that he was guilty, and I do not want to do him an injustice.

(Signed) CLARENCE E. MCCOY

State of Missouri
County of Greene

On this 20th day of April, 1955, appeared before me Mr. Clarence E. McCoy and states under oath that he signed the above statement as his free act and deed.

ROY B. EDWARDS
(*Notary Public*)

My Commission Expires October 8, 1955.

Within one week two other jurors, Earl O. Deaver and Virgil Eads, voluntarily came forward and submitted affidavits as follows:

(Affidavit of Earl O. Deaver, R. 40)

April 23, 1955

To Whom It May Concern:

I was a juror in the trial of O. K. Armstrong, beginning April 11, 1955, and I voted not guilty on the first ballot. There was too much doubt in my mind for me to vote guilty. I went along with the compromise in order to make the verdict unanimous, as I was told by the other jurors this would give us a chance to recommend leniency. I was, and am still, of the opinion that Mr. Armstrong was not guilty of a crime as charged in the indictment.

(Signed) EARL O. DEAVER

State of Missouri
County of Greene

Subscribed and sworn to before me, a Notary Public, by Earl O. Deaver, who states under oath that he signed the above statement as his free act and deed.

J. J. GILBREATH, JR.
(Notary Public)

My Commission Expires March 23, 1955.

(Affidavit of Virgil Eads, R. 41)

EADS' TRAILER COURT
Accessories—Supplies
Virgil and Bonnie Eads
Waynesville, Missouri

April 27, 1955

To Whom It May Concern:

I served as a juror in the trial of Mr. O. K. Armstrong on the charge of income tax evasion.

I cast my ballot in the jury room, "Not Guilty." When the compromise was suggested, I opposed it. I had not made up my mind to agree to the compromise when we came back into the courtroom to ask the judge if we could make recommendations. I felt that if we could not agree, we should come back next morning and discuss the verdict further. The compromise was reached quickly, because a majority of the jurors, after being on the case for three days, wanted to get the matter settled that evening. I finally agreed to the compromise to make it unanimous.

I did not then, and do not now, believe that Mr. Armstrong was guilty of willful and criminal fraud against the government on his income tax. I believed then, and believe now, that the expenses of his writing business were reasonable and necessary, as was shown in evidence; and that any mistakes he made were not with wrongful intent, or with any knowledge of fraud.

(Signed) VIRGIL EADS

State of Missouri
County of Pulaski

Subscribed and sworn to by Virgil Eads before me, a Notary Public in and for Pulaski County, State of Missouri, on this the 27th day of April, 1955.

ARTHUR B. COHN

My Commission Expires 11 June 1956.

The Trial Court directed the clerk to file the affidavit of Juror McCoy (R. 54). Copies of all three affidavits were presented by petitioner in an amended "motion for judgment of acquittal or in the alternative for a new trial" (R. 38). In refusing this motion, the court ordered the affidavits stricken from the record (R. 59). The court cited several cases relating to the principle that affidavits of jurors cannot be considered to impeach a verdict on matters inherent in the verdict (R. 56).

The Circuit Court of Appeals, in affirming the judgment appealed from, stated: "The court held, in effect, that the verdict of the jury could not be affected, disturbed or impeached by the evidence of former jurors as to what had occurred during the deliberations of the jury in the jury room. ... If the discussions and deliberations of jurors in the seclusion of their jury room while attempting to reach an agreement upon a verdict do not inhere in the verdict ultimately returned, we are at a loss to know what would inhere in a verdict."

REASONS FOR GRANTING THE WRIT

I.

The Trial Court Misinterpreted and Misapplied a Decision of This Court in Not Letting Jury Decide a Factual Question

The trial court charged the jury that a certain sum of money received by the petitioner from Reader's Digest was taxable income as a matter of law. As a free-lance writer, the petitioner was not on the payroll of the Reader's

Digest. The question of the petitioner's *intent* and whether he believed the sum in question was a gift was a question of fact to be determined by the jury from the conflicting testimony. The instruction of the trial court was a substantial and material error, prejudicially affecting the substantial rights of the petitioner, and is in direct conflict with the principles announced by this Court in the decision of *Bogardus* v. *Commissioner of Internal Revenue* 58 S. Ct. 61 (302 U.S. 34) (82 L. Ed. 39). In that case the Court in determining whether an amount paid by a corporation to former employees of a related company was a gift or taxable income said:

> "To determine that question we turn to the facts ..." This Court also said: "A gift is nonetheless a gift because inspired by gratitude for the past services of the recipient."

In other words, it depends on the facts to be decided by the jury whether it was a gift or taxable income—not a matter of law to be decided by the court. In all the long line of cases on the subject of whether a payment was a gift and free from tax or a so-called bonus and taxable, it was always a question of fact to be determined from the evidence. The cases involved officers or employees currently or in the past on the payroll. In every case where the amount in question has been held to be taxable income, the recipient was or had been a regular employee, a corporate officer or beneficiary, and the payment was made on that account. The Court of Appeals misinterpreted the above-cited *Bogardus* case in sustaining the charge to the jury. The dissenting opinion in the case of Mr. Justice Brandeis, Mr. Justice Cardozo, Mr. Justice Stone, and Mr. Justice Black contained the following statement:

> "Has it (the payment of a sum of money alleged to be a gift) been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears

a tax. Has it been made to show good will, esteem of kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt."

The dissenting opinion also stated that "we think it was a question of fact," whereas the trial court in the case at bar held that it was a question of law and did not permit the jury to decide it.

II.

The Trial Court's Instruction to the Jury That the Petitioner Had the Burden of Proving His Deductions Is Contrary to Fundamental Principles of Criminal Law

It is believed that the charge by the trial court Judge to the effect that the burden of proof was on the defendant in the trial court to prove to a reasonable degree of certainty the deductions claimed by him in his income tax returns in determining net taxable income, is such a plain, gross and palpable error that this Court has the power to correct in the interest of the proper administration of justice.

This clearly presents a question of importance and affects all subsequent tax fraud criminal cases. While no error was assigned in the court below and while no exception or objection was taken to the charge, this charge is so manifestly contrary to the generally accepted principles of criminal law as to warrant this Court assuming the jurisdiction and issuing the writ of certiorari applied for. *Kessler* v. *Strecker* (307 U.S. 22) (59 S. Ct. 694) 83 L. Ed. 1082; *U. S.* v. *La Frenca*, 282 U.S. 568 (51 S. Ct. 278) (75 L. Ed. 551). *Wiborg* v. *United States*, 163 U.S. 632; *Clyatt* v. *United States*, 197 U.S. 207; *Crawford* v. *United States*, 212 U.S. 183; *Weems* v. *United States*, 217 U.S. 347; and also *Maher* v. *Ely*, 264 U.S. 32; 44 S. Ct. 283, (68 L. Ed. 357). In the latter case this Court said "the character of the defect is such that we cannot relieve ourselves from

its consideration. It is suggested that if the objection had been made earlier, it might have been quickly remedied. . . . The defect may still be remedied on the objection made in this Court."

It is not deemed necessary to cite authorities on the question of the burden of proof in a criminal case. As a matter of fact the trial court in addition to giving the charge here questioned also charged that "the burden of proof is upon the United States to establish the guilt of the defendant upon each count in the indictment beyond a reasonable doubt" (R. 24).

Yet in addition to that charge the trial court further charged as above set forth in effect that the burden of proof was on the defendant to prove "with a reasonable degree of certainty" that certain expenses claimed as deductions in his return were allowable, in determining his net income. The court also charged that "You must make a finding as to the tax due and owing . . ."

The charge is so irreconcilably inconsistent as to constitute a material error affecting the substantial rights of the accused and warranted a new trial.

Haighler v. *U. S.* (172 F. 2nd 986)

But the charge (R. 31) "One claiming the deduction from tax must prove his right thereto by evidence . . . and establish such fact by a reasonable degree of certainty" is directly opposite to the previous charge as to the burden of proof. Such a charge, however applicable to civil cases, is clearly and palpably erroneous in a criminal case,—so much so that it is not deemed necessary to cite authority or do more than to direct this Court's attention to it. This language must have been inadvertently used by the trial court but it was so highly prejudicial to the substantial rights of the petitioner as to warrant this Court in noticing it.

In an income tax evasion case the burden of proof on the government never shifts to the defendant.

Lurding v. *U. S.*, 179 Fed. (2) 419; *Bell* v. *U. S.*, 185 F. (2) 302 Certiorari denied (71 S. Ct. 492) (340 U.S. 930) (95 L. Ed. 671) *U. S.* v. *Phillips*, (217 F. (2) 435).

What this Court said in the case of *Maher* v. *Ely*, 264 U.S. 32, 44 S. Ct. 283, 68 L. Ed. 357, is clearly applicable to this case and the defect may be remedied on application to this Court.

III.

The Court Below Misconstrued and Misapplied Decisions of This Court on the Question of Misconduct of the Jurors

The affidavits of the three jurors in the case at bar clearly show that those jurors did not in fact find the petitioner "guilty as charged." In violation of their oaths as jurors they agreed to an announcement of a verdict of guilty—on the agreement reached and not on the evidence. This agreement to announce a verdict of guilty was based upon consideration of matters outside the evidence, namely, whether or not the court would permit them to recommend leniency in case a verdict was found. The announcement was not based upon a true verdict. It was founded unlawfully upon a compromise, obviously decided *before the verdict was reached*, whereby some jurors agreed to sacrifice their honest convictions (that petitioner was not guilty) based upon the evidence and permit the foreman to announce a verdict of guilt, provided all jurors agreed to recommend leniency.

The Circuit Court of Appeals, in affirming the lower court's refusal to receive the affidavits of the jurors, to consider them and to grant a new trial based thereon, on the theory that the actions and conduct of the jury were "inherent in the verdict," is in direct conflict with the decision of the Supreme Court in *Mattox* v. *United States* (146 U.S. 140) (13 S. Ct. 50) (36 L. Ed. 917).

In this case, this Court held that it was reversible error for the lower court to refuse to consider affidavits of jurors as to certain facts which might have prejudicially influenced their verdict of guilty. Mr. Chief Justice Fuller said:

> "In the case at bar the District Court excluded the affidavits and in passing upon the motion, did not exercise any discretion in respect of the matters stated herein. . . . In *U. S.* v. *Reid*, 12 How. 361-366 affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the Court, said: 'The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. If would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice . . .'
>
> "The opinion (of Justice Taney) thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, *may in the interest of justice create an exception to its own rule*, while, at the same time, the necessity of great caution, in the use of such evidence is enforced.
>
> "This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kansas 538-545: '*Public policy forbids that a matter resting in the personal conscience of one juror should be* received to overthrow the verdict, because being personal it is not accessible to other testimony. . . . But as to *overt acts, they are accessible to the knowledge of all the jurors;* if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received.

They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.'

"We regard this rule thus laid down as conformable to right reason and sustained by the weight of authorities. These affidavits were within the rule, and being material, their exclusion constitutes reversible error. A brief examination will demonstrate their materiality. ... We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court." (Italics added)

This opinion, so eloquently delivered by the Chief Justice of the United States and so compelling in its reasoning, with its supporting words of a former Chief Justice, has stood as a proper guide in the matter of whether affidavits of jurors should be received and considered in setting aside a verdict and granting a new trial. We believe it established that matters which influence the verdict outside and beyond the evidence and proper instructions of the Court *cannot be considered as inherent in the verdict.* For such matters violate the right of a fair trial and constitute misconduct by, or improper influence upon, the jury. But the findings of the 8th Circuit Court of Appeals in the case at bar, inferring that even a compromise in a criminal case upon the guilt or innocence of the petitioner, inheres in the verdict, is in direct conflict with this Court's decision in the *Mattox* case.

The case at bar is not one where the facts and circumstances affecting the verdict were exclusively mental processes within the minds of the three jurors or matters exclusively within the consciences of those particular jurors. They were facts and circumstances necessarily known to all jurors. They permeated and contaminated the verdict, resulting in a verdict not based entirely on the evidence before the jury.

There is a very substantial difference between impeaching a verdict found within the issues of the case and a verdict which was influenced by factors wholly outside any issues in the case. In the case at bar the recommendation of leniency had its effect on the verdict as shown by affidavits of jurors, being a factor wholly outside the question of guilt or innocence. Thus it did not inhere in the verdict.

To say that a jury's verdict cannot be impeached by testimony of jurors themselves is too broad a generality. Certainly if one or more jurors were bribed by another juror, or coerced into agreement, such a factor while within the knowledge of jurors only would not inhere in the verdict, and testimony should be admissible to prove this whether it comes from jurors or elsewhere. It should be admissible to preserve the integrity of the jury system as well as the administration of justice.

"It is a general and familiar rule that arriving at a verdict by any other method except the exercise of judgment and the weighing of the evidence constitutes such misconduct on the part of the jury as will vitiate the verdict." *39 Am. Jurisprudence 123.*

Three jurors in the case at bar swore that the verdict was influenced by factors outside the evidence, principally by an agreement to compromise, contingent upon the trial court permitting the jury to recommend leniency. Juror McCoy: "They finally suggested we compromise the verdict and ask for leniency." Juror Deaver: "I went along with the compromise in order to make the verdict unanimous." Juror Eads: "When the compromise was suggested ... I had not made up my mind to agree to the compromise ... The compromise was reached quickly ... I finally agreed to the compromise."

It is obvious that the agreement, involving such a flagrant sacrifice of honest convictions on the part of some jurors, was made *before* the verdict was reached. Three

jurors, at least, apparently would not have voted guilty except for that factor. In addition, they swore that they never did believe the petitioner guilty. Juror McCoy: "I never believed him guilty ... I hereby certify that the evidence never convinced me beyond a reasonable doubt that he was guilty ..." Juror Deaver: "I was, and am still, of the opinion that Mr. Armstrong was not guilty of a crime as charged in the indictment." Juror Eads: "I did not then, and do not now, believe that Mr. Armstrong was guilty of willful and criminal fraud against the government on his income tax."

Here is an action by the lower court in such conflict with decisions of this Court and with fundamental concepts of criminal law that the testimony of the jurors could not be excluded without (in the words of Mr. Chief Justice Taney *supra*) "violating the plainest principles of justice."

To let this verdict stand in the case at bar, without review, would tend to close the door to the consideration of sworn statements of jurors in all federal Courts as to *any* misconduct or questionable action, and would be in direct conflict with principles affirmed in the following:

Clark v. *U. S.* (289 U.S. 1. 53 S. Ct. 465, October 1932).

In which this Court (Justice Cardozo) held the evidence of jurors was rightfully received and considered: "Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now ..." (Cited: Many cases in point from state courts, as well as some from federal courts.)

Jorgensen v. *New York Ice Machinery Corporation*, (160 Fed. 2nd 187, 2nd Circuit Court of Appeals.)

This case was cited by the 8th Circuit Court of Appeals in affirming the judgment of the case at bar, and we believe it was misinterpreted and misapplied. For in this case cited, the Court of Appeals for the Second Circuit (Judge L. Hand) accepted and considered affidavits of jurors as to matters occurring during their deliberations, in order to determine whether there were circumstances prejudicial to the rights of litigants: ". . . It is not improbable that when the question arises in the future, the testimony of jurors may be held competent, and that we shall no longer hear that they may not 'impeach their verdict,' when it is 'impeachable' if what they say is true. ... In the case at bar we shall accept what the affidavits say. ..."

The above cited case sets forth the principle relied on by the petitioner, that a verdict is impeachable if the facts warrant it. In this respect the decision in the case at bar by the Court of Appeals for the Eighth Circuit is contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the *Jorgensen* case.

U. S. v. *Olive,* 1524-51 U. S. District Ct. for D. C., Criminal Division (not yet reported). In this case after defendant was convicted of murder three jurors presented affidavits that they believed at the trial that defendant was of unsound mind. The trial court (Judge Kirkland) accepted the affidavits and granted a new trial.

It is respectfully submitted that such conflicts with the decision in the case at bar warrant the granting of the writ of certiorari in this case and a decision of this Court to settle an important question of law. Surely it is important that this rule be clarified and established.

Consistent Bulwark of Opinion

In one case after another through the years, the Supreme Courts of various states have built a consistent

bulwark of opinion supporting the principles upon which the petitioner relies in requesting review by this Court of the case at bar. That great weight is given these numerous and uniform decisions of the states' highest tribunals is evidenced in *Mattox* v. *United States* (supra), in which Justice Fuller cited the decision of the Supreme Court of Kansas in *Perry* v. *Bailey* (supra). For this Court to permit the case at bar to stand without review would leave a conflict between the findings of the 8th Circuit Court of Appeals and this body of decisions, paving the way for vast confusion whenever misconduct on the part of the jury, or improper influence, in the jury room or out, is brought forward by the sworn statement of any juror who is invariably in the best position to expose such irregularities and injustices. Outstanding examples follow:

(1) In support of the reception of affidavits of jurors to indicate and explain misconduct or illegal influence:

Casstevens v. *Texas and Pacific Railway Co.* (32 S.W. 2nd, 637) Supreme Court of Texas. "Once material misconduct in arriving at a verdict is shown by undisputed facts, or is found on conflicting evidence, it becomes the duty of the courts to vacate the verdict, unless the party seeking to uphold same removes all reasonable doubt as to the misconduct having resulted to the prejudice of the complaining party. This rule prevails in other eminent courts of last resort."

Wright v. *Illinois and Miss. Telephone Company*, 20 Iowa 195 Supreme Court of Iowa.

(2) In support of the principle that the accused is entitled to a fair trial and to a verdict of the jury on the evidence without consideration of the punishment that might be inflicted.

Crawford v. *State* (24 American Decisions 467) Supreme Court of Tennessee. This case is squarely in point with the case at bar. A new trial was granted to a defend-

ant found guilty of murder with a recommendation of mercy, when it appeared from the affidavits of three of the jurors that they were not satisfied as to the defendant's guilt, and agreed to the verdict only because they believed that a recommendation for leniency would be effectual.

> "(Juror) Brasher's verdict was rendered, not on his belief of the guilt of the prisoner arising from the law and the facts of the case but on considerations entirely foreign to them; for he had not only strong doubts of the guilt of the prisoner, but such doubts as would have prevented him from ever rendering a verdict of guilty of murder. He assented to the rendering the verdict of guilty of murder not because the prisoner was, in his belief, guilty of murder, but because of his recommendation to the mercy of the governor, and his belief that that recommendation would be effectual ... This makes the verdict of Brasher to be occasioned by misrepresentation and mistake."

People v. *Warner* (286 NW, 811) Supreme Court of Michigan.

Counts v. *Commonwealth* (119 S.E. 79). Supreme Court of Virginia.

State v. *Doucet* (147 So., 500) Supreme Court of Louisiana.

State v. *Kiefer* (91 NW, 1117) Supreme Court of South Dakota.

McBean v. *State* (53 NW, 497) Supreme Court of Wisconsin.

(3) In opposition to compromise verdicts, whereby any juror sacrifices his honest convictions and individual judgment:

We submit that decisions of highest state courts uniformly speak out against compromise verdicts, and where it is proved that the element of compromise has over-

powered or unduly influenced the arriving at a verdict, trial courts are reversed and new trials granted in order to protect the rights of litigants and preserve the purity of the jury system.

State v. *Hall* (13 Pac 2nd 624) Supreme Court of Nevada.

"It is the duty of each juror to consult with his fellows and to consider their views, to the end that each may aid at arriving at the truth. Ultimately, of course, each juror should act upon his own convictions; but this is what his oath enjoins on him to do."

Richardson v. *Coleman* (29 N.E. 909) Supreme Court of Indiana.

Goodsell v. *Seeley* (10 NW 44, 41 Am. Rep. 183) Supreme Court of Michigan.

Simmons v. *Fish* (97 NE 102, Ann. Cas. 1912D) Supreme Court of Massachusetts.

Cartee v. *State* (139 Sou. 618) Supreme Court of Mississippi.

Turner and Sons v. *Great Northern Railway Co.* (272 NW 502) Supreme Court of North Dakota.

Meyer v. *Shamp* (71 NW 57) Supreme Court of Nebraska.

Snyder v. *Portland Railway, etc.* (215 Pac. 887) Supreme Court of Oregon.

Commonwealth v. *Meyers* (139 Atlantic 374) Supreme Court of Pennsylvania.

Williams v. *State* (54 American Reports 404) Supreme Court of Tennessee.

Houk v. *Allen* (25 N.E. 897) Supreme Court of Indiana.

The Circuit Court of Appeals in the case at bar misinterpreted and misapplied the decisions cited in its opinion in presenting them to support "that the verdict of the jury could not be affected, disturbed or impeached by the evidence of former jurors..." (App. B). Three of the cases cited by the Circuit Court of Appeals in its opinion are criminal cases (Hyde, Stewart and Rakes), in each of which there was no misconduct on the part of the jury in reaching a true verdict, and no circumstances comparable to the case at bar, in which jurors swore to a factor which clearly indicates a violation of their oaths as jurors to find a true verdict.

In the civil cases, *McDonald* v. *Pless* was based upon unproved allegations of a "quotient" verdict; the others were suits in condemnation proceedings or for damages. In each case it was necessary for jurors to yield and compose their differences in order to reach a verdict as to amounts to be awarded, and in each case, the factors involved actually inhered in the verdict, which was based on the evidence.

In direct contrast to these cases, we submit that the jurors who presented the affidavits in the case at bar were not "impeaching their verdicts"; they were explaining under oath their own misconduct in sacrificing their honest convictions of the innocence of the petitioner in order to gain unanimity on a recommendation of leniency—an action which they had no right to take.

We respectfully and earnestly submit that the conflicts which arise because of the findings of the Circuit Court of Appeals in the case at bar can only be clarified by review of this Court. The important questions of law involved substantially affect the administration of criminal procedure and at least potentially affect all future criminal as well as civil cases. It is important that this Court now end the conflicts arising from decisions as to what constitutes a matter *inherent in a verdict,* upon which no

jury should be questioned and what matters constitute misconduct or other illegal actions outside the protection of what is the rightful duty of a juror.

We believe that the integrity of the whole jury system is at stake for that which destroys public confidence in one jury will inevitably contaminate confidence in all juries. And we further submit that no case could offer a better opportunity for such clarification as this one at bar.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. TRAMMELL
1921 Eye Street, N. W.
Counsel for the Petitioner

APPENDIX

APPENDIX

APPENDIX A

Section 145 (b) Title 26 USCA:

"Failure to collect and pay over tax, or attempt to defeat or evade tax.—Any person required under this Chapter to collect, account for, and pay over any tax imposed by this Chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this Chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Rule 52 (b)—Title 18 USCA—Federal Rules of Criminal Procedure.

"Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

APPENDIX B

Decision

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SANBORN, *Circuit Judge.*

O. K. Armstrong entered a plea of not guilty to an indictment in three counts, each of which charged him, under Section 145(b) of Title 26, U.S.C., with having wilfully attempted to defeat and evade income taxes owed the United States by filing a false return. The first count related to his income tax for 1947, and the following two counts related to his 1948 and 1949 taxes, respectively. He was tried by a jury, which returned a verdict of guilty upon each count. The printed record shows that "on the verdict of guilty the Court assessed a fine of $500.00 on

each of the three counts, making a total fine of $1,500.00 and costs on execution." If this was a general sentence upon all three counts it would only be necessary for this Court to ascertain whether the defendant was properly convicted under any one of the three counts, since the total fine assessed did not exceed that which could have been assessed under a single count.[1] We assume, however, that the sentence was not general and that if the defendant was improperly convicted under any count, the fine under that count would have to be vacated and a new trial directed as to that count.

Two questions are presented for review: (1) whether the District Court erred in failing to give an instruction requested by the defendant which related solely to the third count of the indictment; and (2) whether the Court abused its discretion in refusing to grant the defendant a new trial upon the ground that the jury's verdict was a compromise.

We think the first of these questions was not properly preserved for review. The defendant had requested three instructions. The first had to do with the deductibility of expenses incurred by him in connection with certain speaking engagements. The second related to the deductibility of expenses incurred by him on a trip to South America in December of 1949. The third instruction requested read as follows:

"The court instructs the jury that if you find and believe from all the evidence that the defendant received a Twenty-five hundred dollar ($2,500) check from the Read-

[1] Claasen v. United States, 142 U.S. 140, 146-147; Evans v. United States, 153 U.S. 584, 595; Evans v. United States, 153 U.S. 608; Abrams v. United States, 250 U.S. 616, 619; Pierce v. United States, 252 U.S. 239, 252-253; Brooks v. United States, 267 U.S. 432, 441; United States v. Trenton Potteries Co., 273 U.S. 392, 401-402; Whitfield v. Ohio, 297 U.S. 431, 438; Hirabayshi v. United States, 320 U.S. 81, 85; Pinkerton v. United States, 328 U.S. 640 (footnote on pages 641 and 642); Gantz v. United States, 8 Cir., 127 F. 2d 498, 501; Bowen v. United States, 8 Cir., 153 F. 2d 747, 748, 749; Hansbrough v. United States, 8 Cir., 156 F. 2d 327, 328; Hulahan v. United States, 8 Cir., 214 F. 2d 441, 442; Rosenfield v. United States, 8 Cir., 216 F. 2d 260, 263.

er's Digest, (The Reader's Digest Association, Inc.) on or about November 4, 1949, and if you further find and believe that such check was delivered to the defendant without any services or other consideration having been rendered therefor in the past or anticipated in the future then such check is to be considered a gift and not taxable income, and as a gift, if you so find, it need not have been reported as income on the return of the defendant in the year in which it was received; and this is true even though the Reader's Digest may have carried said check on its records as a bonus, if you so find the defendant had no knowledge thereof."

The check referred to in the third of the requested instructions was one which the defendant had received in 1949 from the Reader's Digest. His testimony was that it was a nontaxable gift, and therefore had not been included as taxable income in his return for 1949. The Government claimed that it was a taxable bonus. The Reader's Digest had reported it as a bonus and had taken a tax deduction for it. With respect to this matter the court instructed the jury as follows:

"There is evidence before you with respect to a payment made by the Reader's Digest Corporation to Mr. Armstrong in 1949. The Government contends such payment was a bonus and therefore additional compensation paid to Mr. Armstrong by the Reader's Digest Corporation in the year 1949, and therefore should be chargeable to him in determining his gross income during the year 1949. Defendant contends that such payment was made and received by him as a gift and therefore the same is not taxable as earned income received by him.

"Under the Internal Revenue Code, 'gross income includes gains, profits and income derived from salaries, wages or compensation for personal services, of whatever kind and in whatever form paid.'

"A bonus paid by a corporate employer to an employee in consequence of his employment is taxable income. A gift by an employer to an employee, made by an employer wholly from altruistic motives of affection and regard and not as a consequence of his employment by the employer, is non-taxable income.

"In considering the matter in this case you will recall Mr. Wallace's testimony that the Reader's Digest Company charged on its books as a bonus the payment of $2500 paid to Mr. Armstrong, and claimed it as a deduction for compensation paid him and so reported it to the Government in a 1090 form which the Reader's Digest Corporation is required to file with the Bureau of Internal Revenue. The intention of the employer in making any such payment is to be ascertained from the facts in the case and determines the liability and the identity of the transaction in question and in the light of the testimony of Mr. Wallace I charge you that the $2500 paid to the defendant in 1949 is and was a bonus and therefore taxable income of Mr. Armstrong in the year 1949, and you may so consider it in determining his tax liability to the Government for that calendar year.

"That fact, standing alone, is not decisive of the issue that you must determine in this case. Mr. Armstrong may be liable to pay income taxes on that sum, but the issue here for your determination is whether he wilfully failed to report such sum in his 1949 return with the intent to defeat and evade any tax due the Government because of such payment.

"Notwithstanding the fact that the $2500 payment made to Mr. Armstrong was a bonus, yet if you should find and believe from the evidence that Mr. Armstrong in good faith believed at the time he received that sum from the Reader's Digest Corporation that the sum was the payment to him of a gift, that he had reasonable grounds for such belief when all the facts and circumstances are con-

sidered surrounding the delivery of that particular check to him by Mr. Wallace, and that Mr. Armstrong, in reliance on such good faith belief, did not report the same in his 1949 income tax return, then under such circumstances Mr. Armstrong could not be said to have been guilty of the wilfulness such as is necessary to find to sustain his conviction in this case because of that item.

"However, if you find and believe from the evidence that Mr. Armstrong knew that said sum was being paid to him as a bonus, the same was given in consideration of his employment by Reader's Digest, as a consequence of his employment by the Reader's Digest, and further find beyond a reasonable doubt that he wilfully failed to report said sum in 1949 income tax return in an attempt to defeat and evade the payment, then if you so find the defendant would be guilty of the charge made against him in the third count of the indictment in this case."

By these instructions the jury was given to understand that, under the evidence, the check for $2,500 was a part of the taxable income of the defendant for the year 1949 and was properly includable as such in his return for that year, but that if he believed it to be a gift, as he had testified, and therefore had not included it in taxable income, he could not, because of his failure to include it in his return, be found guilty of a wilful attempt to evade his income taxes for 1949, as charged in the third count of the indictment.

When the Judge had completed his charge, he asked counsel, "Are there any exceptions to the charge?" Counsel for the defendant said, "Note our objections to the failure of the Court to give the instructions as submitted by the defendant." The Judge said, "Yes, Is that all?" Counsel for the Government said, "I haven't seen them, but I guess it is all right." The Judge replied, "I think I gave them in substance."

Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Apparently no copy of the defendant's requests was furnished counsel for the Government. In its brief the Government complains of this omission on the part of the defendant. The defendant in his brief says: "The Court was appraised of the requested instruction and although the counsel for the government stated he had not seen them he stated that he guessed it was alright. Government counsel certainly had the opportunity to examine the instructions requested if desired."

The defendant did not comply with Rule 30. He evidently did not furnish a copy of his requested instructions to counsel for the Government. He did not specifically state to what claimed error in the instructions he objected and the grounds for his objection. A party objecting to a failure of the trial court to give instructions requested must state specifically to what he objects and why.[2] The

[2] Hall v. Aetna Life Ins. Co., 8 Cir., 85 F. 2d 447, 450-451; Plamer v. Miller, 8 Cir., 145 F. 2d 926, 930; Schuermann v. United States, 8 Cir., 174 F. 2d 397, 401; United States v. Furlong, 7 Cir., 194 F. 2d 1, 3; Zammer v. United States, 8 Cir., 217 F. 2d 223, 227; Plamer v. Hoffman, 318 U.S. 109, 119.

object of the Rule is to reduce the possibility of error by giving the trial judge an adequate opportunity to correct any mistakes in his charge, as well as to afford the opposing party an opportunity to keep error out of the record. See *Schuermann* v. *United States*, 8 Cir., 174 F. 2d 397, 401. It is not inconceivable that in this case, had the defendant distinctly pointed out the exact basis for his objection, the Government might have joined in the request that the issue whether the $2,500 check was a gift or a bonus be submitted to the jury, in order to avoid any question being later raised on that score. Rule 30 is a salutary rule and ought not to be impaired by treating errors in instructions, not specifically objected to, as plain errors which should be noted in the public interest to prevent a miscarriage of justice. The plainer an error in a charge to a jury is, the more likely it is that the error will be corrected by the trial court if its attention and that of opposing counsel is specifically directed to the error.

The vital and controlling issue under the third count of the indictment was not whether the check for $2,500 of the Reader's Digest was income taxable to the defendant but whether the defendant's understatement of his income in his return for the year 1949, which understatement greatly exceeded $2,500, was deliberate or was unintentional. Assuming that the question whether the check for $2,500 was a gift or a bonus was for the jury, we think that the failure of the trial court to instruct the jury in that regard, as requested by the defendant, would not, under the circumstances of this case, call for a reversal of the judgment imposed under count three of the indictment.

The second error asserted by the defendant arises out of the following situation: The case was submitted to the jury on April 13, 1955. The jury returned for further instructions. The court was asked by the foreman of the jury whether the jury could "make recommendations on their verdict." The court said they could. Thereafter, on

the same day, the jury returned a verdict finding the defendant guilty on each count of the indictment. At the time the verdict was returned, the court asked the jury: "Now, gentlemen of the jury and Mr. Frick (foreman of the jury, who signed the verdict and presented it to the court), each of you has agreed to each one of these verdicts (verdict of guilty on each count)? That is the unanimous verdict of the jury and every juror has agreed to the verdict?" There was no dissent by any juror. No request was made that the jury be polled. The court said to the jury, "Now, what recommendation is it that the jury desires to make?" The foreman of the jury replied, "Your Honor, the entire jury recommends leniency in this case." The court replied, "The Court will take that into consideration in assessing the sentence in this case."

On April 19, 1955, the defendant made a motion for a judgment of acquittal, notwithstanding the verdict, or, in the alternative, for a new trial, on the grounds that the verdict was not justified by the evidence and that the court had erred "in refusing to charge the jury as requested."

On April 20, 1955, a verified letter addressed to the trial judge was presented by one of the men who had served on the jury. The letter, which was filed, read as follows:

"I have been much troubled by the verdict cast against Mr. Armstrong last Wednesday in your court.

"Most of the jury did not want to come back; I did not feel Mr. Armstrong was guilty as charged and I argued we should come back next day and debate the issue. They finally suggested we compromise the verdict and ask for leniency, that included most of the jury. But I tell you honestly I made a mistake in agreeing to the compromise. I never believed him guilty, and I want to correct the mistake. I hereby certify that the evidence never convinced

me beyond a reasonable doubt that he was guilty, and I do not want to do him an injustice."

Two other former members of the jury, shortly thereafter, gave sworn statements to the same effect. On May 23, 1955, the defendant, through counsel who had not represented him at the trial, filed suggestion that he should be granted a new trial because it appeared that the verdict of the jury resulted from a compromise reached prior to, and which did not inhere in, the verdict.

The question of the legality of the verdict on the ground that it was a compromise was not raised in the defendant's motion for a new trial, but was raised by the "suggestions" above referred to. The District Court, in denying a new trial and in striking the suggestions of the defendant's counsel from the record, ruled upon the question. The court held, in effect, that the verdict of the jury could not be affected, disturbed or impeached by the evidence of former jurors as to what had occurred during the deliberations of the jury in the jury room. In support of its conclusion in that regard, the court cited and relied upon *Hyde* v. *United States*, 225 U.S. 347, 382-384; *McDonald* v. *Pless*, 238 U.S. 264, 267-268; *Stewart* v. *United States*, 8 Cir., 300 F. 769, 787, 788; *Manhattan Oil Co.* v. *Mosby*, 8 Cir., 72 F. 2d 840, 847, certiorari denied 293 U.S. 623; *Hoblik* v. *United States*, 8 Cir., 151 F. 2d 971, 973; *United States* v. *Kansas City, Mo.*, 8 Cir., 157 F. 2d 459; *Jorgenson* v. *New York Ice Machinery Corporation*, 2 Cir., 160 F. 2d 187, 188-190; *Rakes* v. *United States*, 4 Cir., 169 F. 2d 739, 745.

If the discussions and deliberations of jurors in the seclusion of their jury room while attempting to reach an agreement upon a verdict do not inhere in the verdict ultimately returned, we are at a loss to know what would inhere in a verdict. The District Court was, we think, so clearly right in denying the defendant a new trial upon his claim that the statements of former members of the

jury showed the verdict to be a compromise, that no further discussion of that question is called for or could serve any useful purpose.

A judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No.

O. K. ARMSTRONG, *Petitioner*

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 17, 1956.

TOM C. CLARK
Associate Justice of the Supreme Court of the United States.

Dated this 31st day of January, 1956.

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

September Term, 1955.

No. 15381

O. K. ARMSTRONG, *Appellant,*

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Western District of Missouri

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On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 20, 1956.